82-2133

Office - Supreme Court, U.S.
FILED
JUN 27 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

A. R. MINCH,

Petitioner,

vs.

CITY OF FARGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Paul F. Richard, of
TENNESON, SERKLAND, LUNDBERG,
ERICKSON & MARCIL, LTD.
15 Broadway, Suite 400
Fargo, North Dakota 58102
Telephone: (701) 232-8957
Attorneys for Petitioner

1983—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

QUESTION PRESENTED

Is there an unconstitutional taking where city rezoning of part of a residential block prevents a lot owner who had substantially prepared the lot for multiple dwelling from constructing anything but a single family dwelling, which would be commercially impracticable to sell or lease, and which would prevent the owner's reasonable investment-backed expectations?

TABLE OF CONTENTS

	Page
Citation of Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting Writ	8
Conclusion	13

APPENDIX INDEX

Appendix A—Opinion of North Dakota Supreme Court A-1
Appendix B—Judgment on Remittitur by Cass County District Court A-12

TABLE OF AUTHORITIES

Cases:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 12
Kaiser Aetna v. United States, 444 U.S. 164 (1979) .. 11
Loretto v. Teleprompter Manhattan CATV Corp., — U.S. —, 102 S. Ct. 3164 (1982) 12
Minch v. City of Fargo, 332 N.W.2d 71 (N.D. 1983) 7-8
Nectow v. City of Cambridge, 277 U.S. 183 (1928) 9, 10, 11
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 8, 9
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 9
San Diego Gas and Electric v. City of San Diego, 450 U.S. 621 (1981) 12

Statutes:

U.S.Const., Amend. V and XIV 2, 3
28 U.S.C. §1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. ———

A. R. MINCH,

Petitioner,

vs.

CITY OF FARGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A. R. Minch, the Petitioner herein, prays that a Writ of Certiorari issue to review the opinion of the North Dakota Supreme Court issued on March 30, 1983, and the Judgment on Remittitur entered by the District Court of Cass County, North Dakota, on May 12, 1983, pursuant to the opinion of the North Dakota Supreme Court.

OPINIONS BELOW

The opinion of the Supreme Court for the State of North Dakota is printed in Appendix A hereto, and is reported at 332 N.W.2d 71 (N.D. 1983). The Judgment on Remittitur, entered by the District Court for Cass County, North Dakota, pursuant to the opinion of the North Dakota Supreme Court, is printed in Appendix B hereto, and is not reported.

JURISDICTION

The Judgment on Remittitur from the North Dakota Supreme Court was entered by the District Court for Cass County, North Dakota, on May 12, 1983. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 (3).

STATUTES INVOLVED

This case involves the United States Constitution, Amendments Five and Fourteen, § 1, which provide as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. *U.S. CONST. amend. V.*

§1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. *U.S. CONST. amend. XIV.*

STATEMENT OF THE CASE

A. FACTUAL STATEMENT

In 1968, Petitioner, A. R. Minch (Minch) purchased an old small house in Fargo, North Dakota, in an area which had been zoned since 1925 to permit construction of multiple dwelling units. The house, several blocks from the campus of North Dakota State University, was in a mixed neighborhood of single family houses, sleeping rooms, fraternities and sororities, three-plexes, and larger apartment buildings.

Although the single family house purchased by Minch was more than 60 years old, in poor condition, and had only 1,070 square feet on its story-and-a-half, the property had investment value to Minch. Demand for apartments close to the University campus was very high. The "R-3" zoning permitted construction of an apartment on the lot. Based on his experience, since 1962, of buying old houses in need of repair, upgrading them, and leasing them out, Minch expected a reasonable commercial return from the house. Minch could afford to repair and upgrade the houses, at reasonable rent rates, because he did most of the remodeling labor himself.

Despite much remodeling work, Minch found the house was deteriorating, primarily because of a crumbling foundation which triggered other problems such as twisting of floor joists. In view of the basic structural deterioration of the house, and the strong demand for apartment units in that area, Minch decided in 1975 to erect a replacement for the house. He originally planned a dormitory-like structure for half a dozen residents. Such a dormitory structure was permitted in the R-3 zone.

As a first step toward construction, Minch on June 23, 1975, obtained a city building permit for a seven-stall garage which expressly limited the use of the seven-stall garage for storing private vehicles of the occupants of the main building. Minch sought to build the garage first because he wanted to satisfy in advance any concerns of city officials about off-street parking. Another reason for building the garage before the main dwelling was to provide safe storage for tools and materials during that later construction.

Before Minch was able to start building, some homeowners in the neighborhood circulated and filed a petition opposing the seven-stall garage. The petition was discussed at a meeting of the Fargo Board of City Commissioners on July 1, 1975. Minch told the City Commissioners that the garages were to provide ample parking for the residents of the dormitory-style building he planned. The City Commission voted to refer the general matter of zoning around the University campus to the City Planning Commission, and to request Minch to consider changing his garage plans.

Pursuant to the direction of the City Commission, Minch was contacted by Neil Bergquist (Bergquist), the

city building inspector and zoning administrator. Bergquist discouraged Minch from proceeding on either the seven-stall garage or the dormitory-style dwelling. Instead, Bergquist suggested reducing the size of the garages and building a small apartment house to appease the neighbors. A seven-stall garage would use up too much lot area so that Minch would not be able to put in a large four-plex.

Based upon these conversations with Bergquist, Minch changed his plan from a seven-stall garage to a five-stall garage. Minch did not seek a new permit because Bergquist had told him the original permit for the larger garage was equally valid for the smaller.

Minch then contacted building contractors to hire for construction of the four-plex. The builder which Minch decided to use was too busy completing other construction projects to build the four-plex for Minch in 1975. The builder advised Minch to build the garage first, and indicated he would be able to build Minch's four-plex after the garage was completed.

Minch began construction of the garage in mid-July of 1975. He spent $150 for a survey of the lot, which resulted in moving a neighbor's fence back about three and a half feet. Minch next spent about one month removing wild trees and bushes from the lot. He hauled in $400 worth of fill for a low part of the lot. As he worked on the garage, Minch told neighbors he planned to build a multiple. Among the persons he told was Jacque Stockman, a Fargo City Commissioner, whose son owned a four-plex with two sleeping rooms adjacent to the Minch lot. Minch finished erecting the garage in September of 1975.

During the winter of 1975, neighbors petitioned the city to rezone a small area which included his property. The

petition sought to rezone from R-3 "multiple dwelling districts" to R-1 "one-and two-family dwelling district" an area amounting to less than a block. Excluded from the rezoning was the adjacent property owned by the son of City Commissioner Stockman, which fronts on the same street as other property in the rezoning, and is separated from Minch's lot only by an alley.

Minch attended two meetings of the City Planning Commission to protest the petition. Minch told the Planning Commission of his intentions to put a multiple dwelling on his lot. Because of concerns of legal questions, the Planning Commission on a previous neighborhood rezoning petition had excluded a protesting owner from rezoning. The Planning Commission moved to approve the rezoning petition provided that if there were legal questions, they be cured before reaching the City Commission.

Minch attended the City Commission meeting on April 6, 1976, when the commission first considered the rezoning petition as approved by the Planning Commission. Despite his protests, the City Commission approved the rezoning petition by a unanimous vote, with Commission Stockman abstaining. Final passage was effective May 4, 1976.

After Minch's property had been down-zoned, he sent a letter to Bergquist requesting a permit to complete construction of the four-plex which he and Bergquist had discussed when he reduced his garages from seven to five. Bergquist refused to grant the permit because of the rezoning. Because Minch's lot is slightly less than 47 feet wide, the rezoning from R-3 to R-1 had limited his permitted use for the lot to construction of a one-family dwelling. At the time of trial, Minch still had the five-stall garage and a vacant one-family dwelling on the lot.

B. PROCEDURAL STATEMENT

Minch commenced this action in state district court for Cass County, North Dakota, by Summons and Complaint dated September 8, 1976. This original Complaint and an Amended Complaint, dated July 1, 1981, alleged in the first count that Fargo's rezoning violated Minch's constitutional rights by taking property without just compensation, in the second count that Minch had established a valid nonconforming use, and in the third count that the rezoning was unreasonable, arbitrary and a discriminatory spot zoning, depriving Minch of his property without due process of law or just compensation. The issue of just compensation under the Fifth Amendment not only was raised in the Complaints, but also in the Pretrial Brief submitted by Minch.

The case came on for jury trial on May 3, 1982. Upon the close of all evidence on May 6, the presiding judge granted the motion by the City of Fargo for a directed verdict dismissing the entire action. The trial court issued Findings of Fact, Conclusions of Law, and Order for Judgment. Judgment was entered June 3, 1982.

Among the Conclusions of Law issued by the trial court was:

> VII.
>
> That the action of the City in rezoning Plaintiff's property did not constitute a taking or damaging of property which would require compensation under either the North Dakota or the United States Constitutions.

On appeal, the North Dakota Supreme Court affirmed the Cass County District Court. *Minch v. City of Fargo,*

332 N.W.2d 71 (N.D. 1983), reproduced at Appendix A. The North Dakota Supreme Court discussed Minch's claim for the damaging of his property under the Fifth Amendment, *Id.* at 72 (Appendix p. A-4), but affirmed the Judgment. The court noted that Minch had failed to show the zoning change violated any provision of the United States or North Dakota Constitutions. *Id.* at 74 (Appendix p. A-7).

REASONS FOR GRANTING WRIT

As this Court recognized in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), among the particularly significant factors in determining whether a taking has occurred are the "economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* at 124. This case presents a situation which appears to fit the language of *Penn Central*, which has not been directly addressed by this Court in any other decisions. The question which this case should decide is to what extent rezoning may interfere with distinct investment-backed expectations, as evidenced by construction of part of a project for multiple dwellings. Furthermore, the decision of the North Dakota Supreme Court in this case is contrary to the precedent set by the U.S. Supreme Court in *Penn Central* and other decisions by ignoring the severe interference with investment-backed expectations and commercial impracticability resulting from this rezoning.

I.

A TAKING OCCURS, REQUIRING JUST COMPENSATION, WHERE A CITY REZONES PART OF A RESIDENTIAL BLOCK AND PREVENTS A LOT OWNER, WHO HAD BUILT A FIVE-STALL GARAGE AS PART OF PLANS FOR A FOUR-PLEX APARTMENT FROM CONSTRUCTING ANYTHING BUT A SINGLE FAMILY DWELLING, WHICH WOULD BE COMMERCIALLY IMPRACTICABLE TO SELL OR LEASE, AND WOULD DESTROY THE OWNER'S REASONABLE INVESTMENT-BACKED EXPECTATIONS.

This petition arises from rezoning which has so restricted Minch's lot that there would not be adequate return from any investment in the property. Such rezoning may be challenged for deprivation of property without due process in violation of the Fourteenth Amendment, or for taking without just compensation in violation of the Fifth and Fourteenth Amendments. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978). *See also. Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928).

Although zoning regulations are allowed relatively broad effect in regulating land use, even "important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'." *Penn Central*, 438 U.S. at 127.

Cases cited in *Penn Central* show this Court's historic recognition that where zoning regulations make property uses commercially impracticable, the zoning is invalid as a taking without just compensation. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), a property owner had

sold surface rights, but had expressly reserved the right to remove coal from under the parcels sold. A statute, enacted after the sales, forbade any mining of coal that caused subsidence of any house, unless the house was the property of the owner of the underlying coal, and was more than 150 feet from the improved property of another owner. In holding the statute invalid, the court noted: "To make it commercially impracticable to mind certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414-15.

Commercial impracticability was also a basis for finding a zoning ordinance violated the Fourteenth Amendment in *Nectow*. In *Nectow*, a zoning ordinance which was constitutional in its general scope was nevertheless held to violate the Fourteenth Amendment as applied to the specific property which had been rezoned into a restrictive district permitting only dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses and gardening. 277 U.S. at 185. The parcel in *Nectow* was adjoined on two sides by industry and railroad uses, and on the other two sides by residential development. In finding the zoning unconstitutional, the Supreme Court quoted findings of a court appointed master who determined that the zoning would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the city, taking into account the natural development and character of the district, and that no practical use could be made of the land in question for residential purposes, because, among other things, "there would not be adequate return on the amount of any investment for the development of the property." *Id.* at 187. Noting that the finding that the welfare of the city would not be promoted by the

rezoning was determinative of the case, the court also stated that because of the industrial and railroad purposes of the immediately adjoining lands, the parcel in question had comparatively little value for the limited uses permitted by the ordinance.

The facts in *Nectow* are very similar to those in the present case. The rezoning leaves the Minch property restricted to use for a single family residence in a neighborhood filled with multiple dwellings and sleeping rooms. There would not be adequate return on any investment for further repair or remodeling as a single family dwelling, especially in view of the surrounding neighborhood of multiple dwellings. Development into anything more than a single family dwelling is prohibited by the rezoning, due to the lot's size. Prior to the rezoning, the lot could have been developed into at least a duplex, and the record at trial showed other examples where the city had allowed development of even more multiple units which fell below the 50 foot minimum width requirements of the ordinance.

This Court has recognized that even where a public official may not be able to estop the government from enforcing its regulatory powers, the consent of individual officials to actions by private property owners, "can lead to the fruition of a number of expectancies embodied in the concept of 'single' property—expectancies that, if sufficiently important, the government must condemn and pay for before it takes over the management of the land owner's property." *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). Applying *Kaiser* to the facts in this case, it is clear Minch had a legally recognizable expectancy, based upon the recommendations and

consent of City Building Inspector Bergquist, that he could proceed to develop the four-plex which Bergquist had suggested. Although Bergquist's consent may not be sufficient to estop the city from prohibiting construction, it nevertheless led Minch to expend money, time, and effort toward a property use which cannot be taken away without compensation.

Other recent Supreme Court decisions also have recognized that zoning may not go so far as to deprive the owner of economically viable use of the property in violation of reasonable investment-backed expectations. *See, Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); and *Loretto v. Teleprompter Manhattan CATV Corp.*, —— U.S. ——, 102 S. Ct. 3164, 3174 (1982). See also, *San Diego Gas and Electric v. City of San Diego*, 450 U.S. 621 (1981), in which a dissent by Justice Brennan, joined by Justices Stewart, Marshall, and Powell, and endorsed by Justice Rehnquist concluded that a temporary taking by enactment of a zoning regulation is compensable and that the ultimate goal of the Courts must be to assure the land owner receives just compensation. *Id.* at 659-60.

The *Agins* decision is instructive on the question of a "taking" in the present case. In *Agins*, a rezoning which prohibited dense development on five acres, but would allow up to five single-family dwellings on that property was held not to be a taking because the appellants were "free to pursue their reasonable investment expectations by submitting a development plan to local officials." 447 U.S. at 262. The land in *Agins* was prime residential land, in the most expensive suburban property in the State of California. *Id.* Presumably, such prime land could still be sold or developed within reasonable commercial ex-

pectations, because of the very exclusivity created by the rezoning. In contrast, Minch has been left with a lot on which can only be placed a single family dwelling in a neighborhood filled with multiple uses.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted this — day of June, 1983.

Paul F. Richard, of
TENNESON, SERKLAND, LUNDBERG,
ERICKSON & MARCIL, LTD.
15 Broadway, Suite 400
Fargo, North Dakota 58102
Telephone: (701) 232-8957
Attorneys for Petitioner

APPENDIX A

In the Supreme Court
State of North Dakota

A. R. Minch,
Plaintiff and Appellant,

vs.

City of Fargo,
Defendant and Appellee.

Civil No. 10,267

Appeal from the District Court of Cass County, the Honorable Norman J. Backes, Judge.

AFFIRMED.

Opinion of the Court by Pederson, Justice.

Tenneson, Serkland, Lundberg, Erickson & Marcil, 15 Broadway, Suite 400, Fargo, for plaintiff and appellant; argued by Ronald H. McLean.

Solberg, Stewart, Boulger & Miller, P. O. Box 1897, Fargo, for defendant and appellee; argued by Wayne O. Solberg.

PEDERSON, Justice.

The City of Fargo rezoned an area in the city which included a small lot owned by Minch. Minch claimed that he had plans for, and had made, investments in some improvements on his lot that are prohibited by the new zoning ordinance. His suit against Fargo is described more fully in *Minch v. City of Fargo*, 297 N.W.2d 785 (N.D. 1980).

That was an appeal from a clearly interlocutory determination and, because no Rule 54(b), NDRCivP[1] order had been entered, we remanded for further proceedings which have now occurred.

Minch sought, in the alternative: (1) a declaration that the zoning ordinance was unconstitutional; (2) compensation for the "taking or damaging" of his property (inverse condemnation); or (3) a declaration that he had established a nonconforming use. He demanded a jury trial on the second and third alternative.

A jury trial was had; however, when all testimony was in, the trial court determined that there was a preliminary question for the court. The court made findings of fact, conclusions of law, and order for judgment of dismissal with prejudice and on the merits. We affirm the judgment.

Before we reach the issues discussed by the parties, it might be helpful to analyze some of the procedural confusion encountered in zoning and inverse condemnation law. The Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, Dallas, has periodically addressed these and other related subjects. Particularly interesting articles in some of their annual publications are: Arnebergh, *Recent Developments in the Law of Inverse Condemnation* (1974); Huxtable, *Inverse Condemnation—Its Structures, Advantages, and Pitfalls* (1977);

[1]Rule 54(b), NDRCivP, in effect provides that when fewer than all of the claims or all of the rights and liabilities between the parties are adjudicated by any order or other form of decision, it is presumed that the trial judge intends to retain jurisdiction so that revisions of that order can be considered at any time up to the entry of the final judgment. These orders are accordingly interlocutory, and appeal therefrom is neither permitted nor required. That presumption is overcome when the trial court makes an express determination that there is no reason for delay and express direction that final judgment be entered. See also Rules 20 and 21, NDRCivP, relating to severing parties or issues and ordering separate trials.

Sackman, *Factors in Inverse Condemnation* (1978); Kanner, *Inverse Condemnation Remedies In An Era Of Uncertainty* (1980); and Sackman, *When Is A "Taking" Not A "Taking"?* (1982).

In the 1980 publication, Professor Kanner of Loyola Law School in Los Angeles wrote about "a veritable torrent of legal commentaries vying with one another in pointing out the glaring deficiencies in the doctrinal bases of the existing law . . . ." Kanner quotes from one of those commentaries as follows:

> " 'Judicial efforts to chart a usable test for determining when police power measures impose constitutionally compensable losses have, on the whole, been notably unsuccessful. With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric. Even the modicum of predictability which might otherwise inhere in the pattern of judicial precedents is impaired by the frequently reiterated judicial declaration that each case must be decided on its own facts. In part, this state of affairs may be attributed to the amorphous nature of the legal delemma posed by the need to balance the interest in social control against the interest in distributive justice. But, in part at least, it also reflects the absence of a generally accepted theoretical rationale for circumscribing the boundaries of the police power, as well as the persistent reluctance of legislatures to provide statutory guidelines or criteria for the resolution of the issues thus posed." Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condmenation Criteria,* 44 So.Cal.L.Rev. 1 (1970).

In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978), Justice Brennan, for the majority, with Justice Rehnquist and others dissenting, reviewed "the factors that have shaped the jurisprudence of the Fifth Amendment injunction 'nor shall private property be taken for public use, without just compensation.' " Subsequently, in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), Justice Rehnquist, for the majority, with Justice Brennan and others dissenting, quoted approvingly from *Penn Central* that the United States Supreme Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated . . . ."

Clear guidelines are similarly absent from the variety of precedents pronounced by this court. Cases and authorities that may be applicable to this determination are cited in the comprehensive analysis made by Justice VandeWalle in *Eck v. City of Bismarck*, 283 N.W.2d 193 (N.D. 1979) (Eck I).[1] See also *Rippley v. City of Lincoln*, — N.W.2d — (N.D. 1983), and *Eck v. City of Bismarck*, 302 N.W. 2d 739 (N.D. 1981) (Eck II). *Eck I*, *Eck II*, and *Rippley* were zoning cases. Compare *Yegen v. City of Bismarck*,

---

[1]General rules are especially made inapplicable by specific statutes and, in some cases, by the procedures adopted by the parties. "Zoning with compensation" is involved under some statutes, such as junkyard and billboard control along highways, pursuant to Chapters 24-16 and 24-17, NDCC. See *City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969). The scope of the pleadings, prayer for relief ,and demand for jury trial can all complicate the adoption of judicial guidelines. Compare the complexities of the instant case with the straight lines of *Rippley v. City of Lincoln*, — N.W.2d — (N.D. 1983), both cases involving identical legal principles. Also compare the law proclaimed in *City of Fargo v. Fahrlander*, 199 N.W.2d 30 (N.D. 1972), where mandamus by a property owner appears to be an approved remedy for someone in lieu of inverse condemnation. A legislative prescribed remedy would be helpful. See generally 27 Am.Jur.2d, Eminent Domain §§ 478-507.

291 N.W.2d 422, 424 (N.D. 1980) with syllabus 5 of *Northern Pacific Railway Co. v. Morton County*, 131 N.W.2d 557, 559 (N.D. 1964).

It is clear that whether or not there is a taking is a question of law which ordinarily is not to be presented to a jury. See the discussion in *United Power Ass'n v. Heley*, 277 N.W.2d 262 (N.D. 1979). Nevertheless, where there is a dispute of the facts showing that there has been a taking or damaging of property, as there is in the instant case, there must be a hearing before the trial court on that fact question before the court can determine the question of law. It logically follows that findings of fact should be (and were) made as required by Rule 52(a), NDRCivP.[3] To the extent that our disposition of this case may involve fact issues, we determine only if the findings of fact made by the trial court are clearly erroneous.

I.

First, we will consider Minch's allegations that the rezoning ordinance is unconstitutional because it is "an unreasonable, arbitrary, and discriminatory spot zoning." Minch fails to advise us which provisions of the constitution are claimed to be violated.[4] Conclusion of law VIII provides:

---

[3]When it is necessary to resolve conflicting evidence, the action is "tried upon the facts" within the scope of Rule 52(a), NDRCivP., *e.g.*, *Voth v. Voth*, 305 N.W.2d 656, 658 (N.D. 1981). Suits involving zoning ordinances, which involve fact resolution, are not exempt from the operation of Rule 52(a). See *City of Fargo, Cass Cty. v. Harwood Tp.*, 256 N.W.2d 694 (N.D. 1977).

[4]We could speculate that Minch may have had in mind: Sections 1, 11, 13, or 20 of Article I of the Constitution of North Dakota, or Section 1 of Article 14 of the Amendments to the Constitution of the United States. On the other hand, he may have meant Section 16 of Article I of the North Dakota Constitution, or Article 5 of the Amendments to the United States Constitution.

"That the action of the City in rezoning plaintiff's property was based upon a comprehensive master plan and was in conformity with that plan and with a systematic program of 'down-zoning' or 'corrective zoning' and was not arbitrary and capricious."

Minch refers us to finding of fact VI as the support for conclusion of law VIII. Finding of fact VI provides:

"That the 'down-zoning' or 'corrective zoning' was in accordance with the comprehensive master plan of the City, which is known as the 'Barton-Aschman Plan.'"

It is argued by Minch that that finding of fact is not supported by sufficient evidence—that the testimony more aptly indicates that the City was only reacting to the whims of a group of disgruntled neighbors. We believe that city officials may, by reacting to even unreasonable complaints, enact constitutional ordinances.

The validity of ordinances which exercise control over land use through police powers (zoning) has been long recognized. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 ALR 1016 (1926). See also *Golden v. Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972), and *Eck II*, *supra*.

"In enacting a zoning ordinance the governing body of the city is exercising a legislative function, and where the question whether the determination of the City Council that a certain district shall be included in a classificaion of a comprehensive zoning plan is an unreasonable, arbitrary or unequal exer-

> cise of power is fairly debatable, courts will not substitute their judgment for that of the legislative body, and the conclusion of the latter will not be disturbed." *Midgarden v. City of Grand Forks*, 79 N.D. 18, 54 N.W.2d 659 (1952) at syllabus 1.

See *Munch v. City of Mott*, 311 N.W.2d 17 (N.D. 1981).

Specific testimony by witnesses that a zoning change in a specific case is reasonable and is not arbitrary or discriminatory does not provide the type of convincing evidentiary support required to sustain either a finding of fact or a conclusion of law. Minch has failed to show that the zoning change violated any provision of the United State or North Dakota Constitution. Findings or conclusions that a statute or ordinance is constitutionally valid is entitled to a presumption of correctness.

II.

Next we address the issue—did the rezoning exceed the bounds of police power and accomplish a "taking or damaging" without just compensation as prohibited by Article I, § 16 of the North Dakota Constitution.

We said before in remanding this case:

> "This court has counted zoning as a manifestation of the police power. . . . A decrease in the monetary value of property as a result of a zoning action does not necessarily amount to a taking or even a damaging which would oblige the governmental entity to pay compensation. . . . Only where the zoning ordinance 'forbids substantially *all* use of regulated property' will a suit in inverse condemnation be appropirate.

> . . . If the ordinance is arbitrary, discriminatory or otherwise illegal but does not effect a taking or damaging, declaratory relief must be sought. . . . . Thus zoning is relatively insulated from claims for damages." *Minch v. City of Fargo, supra,* 297 N.W.2d at 790. [Emphasis in original.]

Because Minch had alleged substantial reliance, we pointed out the need for an inquiry into Minch's reliance in this case in the light of our holding in *City of Fargo, Cass Cty. v. Harwood Tp.*, 256 N.W.2d 694, 700 (N.D. 1977), where we stated:

> ". . . a landowner who has made substantial expenditures in reliance upon existing zoning or otherwise committed himself to his substantial disadvantage before the zoning change may be protected."

Without referring us to any specific finding of fact or to any specific conclusion of law, Minch provides us with a de novo type discussion of the testimony supporting his argument that he was entitled to rely upon representations allegedly made by representatives of the City. He does not refute the findings that were made nor the conclusions based thereon.

The City has called our attention to findings of fact numbered XV and XIX as follows:

"XV.

> "That plaintiff asserts that it was his intention to construct a four-plex on his property before it was rezoned from R-3 to R-1, but that his intentions were never conveyed to the City by securing a building

permit, by applying for a building permit, or making known his intentions to the City in any other way."

"XIX.

"That plaintiff had not commenced the construction of a multiple dwelling unit, nor had he established a multiple dwelling use on the property prior to the rezoning action which was finalized on May 4, 1976."

and conclusions numbered I and VI based thereon as follows:

"I.

"That, in 1975 and 1976, the construction of a five-stall garage on plaintiff's property was permitted, either under the prior zoning classification of R-3, or under the subsequent classification of R-1."

"VI.

"That the expenditure of funds by plaintiff for the construction of the five-stall garage does not constitute reliance on the pre-existing zoning classification of R-3, since such construction was permissible before and after the zoning change."

There were other findings of fact and conclusions which also have a bearing upon the issue before us. Findings which have not been attacked are presumed to be correct. *Fiebiger v. Fischer,* 276 N.W.2d 241, 244 (N.D. 1979). We note that Minch makes no argument that the Fargo zoning ordinance "forbids substantially all use" of his property. *Eck I, supra,* 283 N.W.2d at 201. "Substantial reli-

ance" can substitute for the loss of "substantially all use." *Minch v. City of Fargo, supra,* 297 N.W.2d at 790, and *City of Fargo, Cass Cty. v. Harwood Tp., supra,* 256 N.W. 2d at 700.

Although the findings of fact might have been more explicit, we have no problem understanding therefrom the basis of the trial court's conclusion. There was no substantial expenditure in reliance on an unchanged ordinance.

Another matter that is argued in support of Minch's claims is that of estoppel. Minch says that all of the elements of estoppel, as set forth in *Farmers Cooperative Association of Churchs Ferry v. Cole,* 239 N.W.2d 808, 313 (N.D. 1976), have been met. However, it is clear that there is a dispute of facts upon which an estoppel could be based. This is expressed in finding of fact XVI. The court concluded in conclusions of law IV and V that Minch was not entitled to rely on the discussions he had with the city building inspector.

> "Estoppels against the public are little favored. They should not be invoked except in rare and unusual circumstances, and may not be invoked where they would operate to defeat the effective operation of a policy adopted to protect the public. They must be applied with circumspection, and should be applied only in those special cases where the interests of justice clearly require it." *Abbey v. State,* 202 N.W. 2d 844, 851 (N.D. 1972), quoting from 31 CJS Estoppel § 138.

III.

Finally, we must address Minch's argument that he had

established a non-conforming use. The trial court conclusion of law IX provides:

> "That the actions of the plaintiff prior to the rezoning of his property on May 4, 1976, did not constitute the establishment of a non-conforming use."

That conclusion is supported by finding of fact XVIII as follows:

> "That the five-stall garage which was constructed on plaintiff's premises was for the ostensible purpose of use with a dwelling unit having single family characteristics, but utilized by more than one party; and that the potential use for said garages remains the same after the rezoning."

Finding of fact XIX, which we hereinbefore quoted, supplies additional support for conclusion IX. These findings of fact are not clearly erroneous and we are satisfied that the trial court drew an appropriate conclusion therefrom. Actual nonconforming use as distinguished from mere contemplated use is a requisite. See 8A McQuillin, Municipal Corporations, 3rd Ed. Revised, §§ 25.185-25.188a.

The judgment is affirmed.

/s/ Vernon R. Pederson
/s/ Gerald W. VandeWalle
/s/ Paul Sand
/s/ Wm L. Paulson
/s/ Ralph J. Erickstad, C.J.

APPENDIX B

In District Court, County of Cass, State of North Dakota

A. R. Minch,

Plaintiff,

vs.

City of Fargo,

Defendant.

Judgment on Remittitur

The above-entitled action come on for trial before this Court and a jury, the Honorable Norman J. Backes, presiding, on the 3rd day of May, 1982, and the plaintiff appearing personally and with his attorney, Ronald H. McLean of the firm of Tenneson, Serkland, Lundberg, Erickson & Marcil, Ltd., and the defendant having appeared through its attorney, Wayne O. Solberg, of the law firm of Solberg, Stewart, Boulger & Miller, and the issues having been tried, and the Court having determined that there are no issues of fact for determination by the jury, and the Court having heard and considered the evidence offered by the parties, having considered the exhibits and arguments of counsel, and having made its findings of fact, conclusions of law and order for judgment dismissing plaintiff's complaint; and upon appeal to the North Dakota Supreme Court, and judgment having been affirmed,

NOW, THEREFORE, IT IS HEREBY ADJUDGED AND DECREED that defendant have judgment on remittitur against the plaintiff for dismissal of the above-entitled action with prejudice and upon the merits and for its costs and disbursements as taxed and allowed for the trial in the amount of $1,165.40 plus costs on appeal in the amount of $75.00 for a total of $1,240.40.

WITNESS, The Honorable Norman J. Backes, Judge of the District Court, and the North Dakota Supreme Court, this 12th day of May, 1983.

BY THE COURT:

/s/ Ruth Hellem
Clerk of District Court